Vol 311

FILED
OCT 25 1940
CHARLES ELMORE CROPLEY
CLERK

No. 525

October Term, 1940

In the Supreme Court of the United States

READING COMPANY

Petitioner

v.

THOMAS E. LARKIN

Respondent

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

JOHN T. BRADY,
18 N. Third St.,
Harrisburg, Pa.
Counsel for Petitioner.

In the Supreme Court of the United States

October Term, 1940 No

READING COMPANY

Petitioner

v.

THOMAS E. LARKIN

Respondent

To the Honorable, the Supreme Court of the United States:

The petition of Reading Company respectfully shows to the Court as follows:

This is a suit instituted on September 30, 1938, in the United States District Court for the Middle District of Pennsylvania, by Thomas E. Larkin, plaintiff, against Reading Company, defendant, to recover damages for personal injuries sustained by him on January 9, 1937, while employed as a yard brakeman at defendant's classification yard, located at Rutherford, on the Lebanon Valley Branch, about five miles east of Harrisburg, in Dauphin County, Pennsylvania.

The action was brought under the Federal Employers' Liability Act of April 22, 1908, C. 149, 35 Stat. 66, as amended, (U. S. C. A., Title 45, Sections 51-59) (R. 6).

The case was tried before Hon. A. W. Johnson, United States District Judge, and a jury, at Lewisburg, Pennsyl-

vania, on January 30, 31, and February 1, 1939, and resulted in a verdict in favor of the plaintiff in the sum of $15,000. (R. 147).

The defendant filed motions for a new trial (R. 148) and for judgment in its favor on the points reserved (R. 150).

The learned trial Judge on July 17, 1939, denied these motions and directed judgment to be entered on the verdict (R. 151-154).

An appeal was taken to the United States Circuit Court of Appeals for the Third Circuit, and that Court, on July 17, 1940, affirmed the judgment of the District Court. (R. 157), and on September 11, 1940, denied petition for rehearing (R. 172).

The matter involved in this case is whether the plaintiff, at the time of his injury, was engaged in interstate transportation, or in work so closely related to it as to be a part of it, and presents the following questions:

(a) The correctness of the ruling of the United States Circuit Court of Appeals for the Third Circuit, in holding, as a matter of law, that a certain car, in the movement of which plaintiff was employed at the time of the accident, was engaged in interstate transportation.

(b) The correctness of the ruling of the trial court, affirmed by the Appellate Court, in admitting plaintiff's testimony concerning statements alleged to have been made to him by the conductor of the crew of which he was a member, relative to the placement of an empty car and its intended use.

(c) The correctness of the ruling of the trial court, affirmed by the Appellate Court, in denying defendant's motion for a new trial.

The plaintiff was injured on January 9, 1937, at the Rutherford Yards of Reading Company (R. 17, 25), while employed in the capacity of a yard brakeman (R. 17), the other members of the crew being Calvin Emerick, engineer, Coover Smith, fireman, Edgar Rizzer, brakeman, and George Hocker, conductor (R. 18). Upon reporting for work, James B. Cleckner, Yardmaster in charge of operations, whose duty it was to give instructions to the switching crews (R. 80), directed Conductor Hocker, as the first work to be performed, to shift the power house siding, to take out two cars, one an empty coal car, identified as Reading No. 73165, and the other containing ashes, Reading No. 83522, and with these two cars to proceed to track 17, pick up two other cars standing on that track, one a car of coal, identified as Reading No. 24626, and the other a Company tool car, Reading No. 92095, and dispose of the four cars (R. 81).

The purpose in moving the two cars from the power house siding was to permit the placement of a loaded coal car at the plant (R. 81). This latter car was not involved in the movement resulting in the accident.

Track No. 17, upon which the two cars, Reading No. 24626, loaded with coal, and Reading No. 92095, the tool car, were standing, leads from and immediately adjoins a track known as the thoroughfare track. In carrying out the instructions given them, the crew, going westwardly, first placed the two cars taken from the power house siding, Reading No. 73165, the empty coal car, and Reading No. 83522, containing ashes, on the thoroughfare track. The shifting engine, which was at the rear, or east end of the draft, was cut off just before reaching the switch connecting this track with No. 17, and the two cars were allowed to drift to a point about opposite the two cars on No. 17, when Brakeman Larkin, who was riding the first car, Reading No. 73165, applied the brakes.

He then descended, walked to the adjoining track, No. 17, and was in the act of ascending the ladder on the east end of the tool car, Reading No. 92095, the western of the two cars there standing, when the engine, having passed through the switch, came in on track No. 17, and coupled to the car nearest to it, Reading No. 24626, the loaded coal car. Plaintiff, as the result of the impact, fell from the ladder of the tool car and the coal car passed over his arm, necessitating amputation (R. 22-25).

The four cars involved at the time of the accident were routed as follows:

Reading No. 24626, bituminous coal, consigned by Reading Company from Rutherford, Pennsylvania to itself at Gettysburg, Pennsylvania (R. 47).

Reading No. 73165, an empty coal car, being moved within yard limits, to make room for a loaded coal car, was without any assignment whatever.

Reading No. 83522, ash car, consigned by Reading Company from Rutherford, Pennsylvania, to itself at Steelton, Pennsylvania (R. 55).

Reading No. 92095, the tool car, consigned by Reading Company from Rutherford, Pennsylvania, to itself at Wayne Junction, Philadelphia, Pennsylvania (R. 43).

The coal in Reading No. 24626 was originally contained in B. & O. No. 327256. This latter car was derailed in Harrisburg, enroute to the Rutherford Yards, on December 7, 1936, more than a month prior to the accident. Within a few days thereafter, the coal, which had been reloaded in Reading No. 24626, was taken by the Railroad Company for

its own use. The through bill of lading under which it was moving in interstate service, was surrendered, the name of the consignee appearing thereon was changed from Consolidation Coal Company to Reading Company, Harrisburg was substituted for Port Reading as the place of destination, and a notation stamped upon it showing that the coal had been taken for Company needs. On December 30, 1936, this waybill was forwarded by J. S. Klinedinst, Agent for Reading Company at Harrisburg, to W. E. Murphy, Auditor of Freight Traffic at Philadelphia, with the advice that the coal had been ordered by C. E. Chamberlin, Superintendent of Reading Company, for Company use. (R. 45). On December 11, 1936, A. T. Owen, Superintendent of Transportation of Reading Company, by letter, advised the Consolidation Coal Company, that B. & O. car No. 327256 "was found on our line to be damaged *and will not go forward to destination,*" (Italics supplied) and requested that claim for the value of the coal be made. (R. 54). Under date of December 22, 1936, received by Reading Company on December 30, 1936, the Consolidation Coal Company presented its formal claim for $69.32, the value of the coal so taken, attaching thereto the original letter from the Superintendent of Transportation advising that the coal would not go forward to destination (R. 51-55). This claim was received by Reading Company on December 30, 1936, but was not actually paid until put through in the January accounts on January 21, 1937 (R. 51-55).

The waybill for Reading No. 24626, covering the movement from Rutherford, Pennsylvania, to Gettysburg, Pennsylvania, also indicated that the coal had been spilled from the B. & O. car, and that it had been taken for Company use (R. 48).

Port Reading, N. J., the original destination of the B. & O. car, is east of Rutherford, while Gettysburg, is west. The plaintiff, himself, testified that the Reading car was to be placed in position for a westbound movement. (R. 21).

Yard Master Cleckner testified as to the instructions he had given to Conductor Hocker, as to the disposition to be made of the four cars (R. 81), and was fully corroborated by Conductor Hocker (R. 89).

As to the empty coal car, Reading No. 73165, his direction was: "place it on the extension of the transfer dock". (R. 81). He further testified that at the time this instruction was given he had no knowledge of the purpose for which this car, Reading No. 73165, was to be used; that it was to be placed on the extension track, the storage track, for later use if needed in place of some defective car; that he had no information as to what car would be dumped into it, that the trestle to which the extension track leads was frequently used for dumping crippled cars; that two cars can be placed on top of the trestle and two underneath it; that the extension track accommodates five or six empties; that bituminous and anthracite coal, sand, stone and other commodities are transferred at the trestle; that this was an empty car to be used as needed in the yard (R. 82-85). Conductor Hocker testified to like effect, that the yard master had instructed him to place the empty coal car on the extension track leading to the coal trestle, used for the storage of empty cars, and not under the dock, and that he had no knowledge of the use to be made of it (R. 89-90).

After the accident, the crew, of which the plaintiff was a member, did nothing further with respect to the four cars in question. About twenty or thirty minutes afterwards, another yard crew, in charge of Conductor Moulair, in order

to clear the thoroughfare track, removed the two cars still standing there, and placed the car of ashes at the east hump and the empty coal car under the dock. (R. 83). Even then the Yardmaster did not know what use would be made of it (R. 87). Sometime on that day, January 9, 1937, the contents of Central Railroad Company of New Jersey car No. 61373, bituminous coal, moving from West Virginia to New Jersey, were dumped into Reading No. 73165 (R. 55). This accident occurred shortly after the plaintiff had reported for work at 8:15 a. m., but the record is silent as to what time of day the transfer took place. The car moved out of Rutherford towards the original destination of the shipment the next day, January 10.

Over objection, the plaintiff was permitted to testify that on the morning of the accident, after leaving the office of Yardmaster Cleckner, on the way to his place of work in the yard, Conductor Hocker told him "that empty car we were going to place under the coal trestle or gravity dump" (R. 20). He later testified that his information from the same source was that it was to be loaded with coal from a crippled car (R. 23). He had no conversation with Yardmaster Cleckner.

There was no material difference between Yardmaster Cleckner's version of his instructions with respect to the placing of the other three cars in the yard (R. 81, 86), and the understanding of Conductor Hocker (R. 89), and that of the plaintiff (R. 21). The movements contemplated were the usual ones preparatory to the assembling of a train, the placing of cars at a hump, later to be moved by gravity under the control of hump riders (R. 88), guided by a tower operator (R. 88), locating a car on a classification track, later to be incorporated as a unit in an appropriate train. There is nothing in the record that can be construed as indicating

that plaintiff's crew had any duties to perform in connection with the actual making up of a train.

These four cars left Rutherford, each in a different train, within a day or two after the accident. Reading No. 73165, after receiving the contents of C. R. R. of N. J. No. 61373, passed into New Jersey. The other three cars did not cross the State line. Each train, in addition to the particular car here under consideration, contained, among others, cars moving in interstate transportation. Testimony as to this was admitted over objection (R. 58, 61).

The Trial Court submitted to the jury the question whether or not the plaintiff was engaged in interstate commerce while handling these four cars, or any one of them (R. 122, 127).

The Circuit Court of Appeals for the Third Circuit, in affirming the judgment of the District Court, held:

(a) As a matter of law that the title to the coal in Reading No. 24626 had not passed from the original consignor to the defendent so as to divest the movement of its interstate character, and that the plaintiff was engaged in interstate transportation at the time of his injury.

(b) The plaintiff's testimony concerning statements alleged to have been made by Conductor Hocker, as to the placement of the empty coal car, Reading No. 73165, and its intended use, was admissible.

That Court further held that the other two cars, Reading No. 83522, containing ashes, and Reading No. 92095, a tool car, did not figure in a forward movement of interstate commerce.

The statutory provision under which the jurisdiction of this Court is invoked is Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. Section 347 (a), providing that it shall be competent for the Supreme Court to require by certiorari upon the petition of any party to a civil cause in the circuit court of appeals that the case be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

The sole question involved is whether the plaintiff was engaged in interstate transportation at the time he was injured, and the case involves the application of the Act of Congress, the Federal Employers' Liability Act, of April 22, 1908, c. 149, 45 USCA Sec. 51, which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery,

track, roadbed, works, boats, wharves or other equipment."

This act was later amended, but not until more than two years after the cause of action accrued: Act of August 11, 1939, 45 USCA Section 51.

Your petitioner avers that the judgment of the United States Circuit Court of Appeals for the Third Circuit denies to your petitioner a right, privilege and immunity under the Federal Employers' Liability Act, which was duly set up and claimed in the District Court of the United States for the Middle District of Pennsylvania, and in the United States Circuit Court of Appeals for the Third Circuit.

The Circuit Court of Appeals erred in affirming the judgment of the District Court:

(1) In holding that as a matter of law the coal car, Reading No. 24626 was moving in interstate commerce at the time of the accident.

(2) In holding that the testimony of the plaintiff, concerning statements alleged to have been made to him by the conductor of the crew as to the placement of the empty car, Reading No. 73165 and its intended use was admissible.

(3) If as a matter of law, the interstate movement of the coal from West Virginia to New Jersey, originally contained in B. & O. 327256, had been broken and ended approximately a month before the accident, and it was being transported in Reading No. 24626 from Rutherford, Pennsylvania to Gettysburg, Pennsylvania, as an independent shipment, and assuming that the evidence with respect to the placement and use of the empty car, Reading No. 73165, was a matter for the jury,

in denying a new trial, for the reason that the Circuit Court of Appeals found that the other two cars, Reading No. 83522, the ash car, and Reading No. 92095, the tool car, did not figure in a forward movement in interstate commerce, whereas the District Court submitted to the jury the question whether or not the plaintiff was engaged in interstate commerce while handling these four cars, or any one of them (R. 122-127), and it is impossible to say upon the movement of which car the jury based its conclusion that the plaintiff was so engaged.

Your petitioner respectfully submits that the decision of the United States Circuit Court of Appeals for the Third Circuit, in affirming the judgment in this case, is not in accord with applicable decisions of this Court, and with decisions of other circuit courts of appeals, and with respect to the admissibility of the hearsay evidence in connection with the placement and use of one car, is in conflict with a former decision rendered by itself, and with decisions of State courts based thereon.

The question of plaintiff's employment in interstate transportation under all the circumstances of this case, and the question as to the admissibility of the hearsay testimony given by the plaintiff, with respect to the placement and intended use of the one car, are questions of law of great general importance to your petitioner, as well as to other railroad companies and employes.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court on a day certain to be therein

designated, a full and complete transcript of the record and all proceedings of said United States Circuit Court of Appeals for the Third Circuit in the said case, which was entitled in that Court, *Reading Company, Defendant-Appellant vs. Thomas E. Larkin, Plaintiff-Appellee,* No. 7188 October Term, 1939, to the end that the said case may be reviewed and determined by your Honorable Court, as provided by law, and that your petitioner may have such other and further relief in the premises as to this Court may seem proper, and that the said judgment of the said United States Circuit Court of Appeals for the Third Circuit may be reversed by this Honorable Court.

READING COMPANY

By: Jno. T. Brady
Counsel for Petitioner.
18 N. Third St.,
Harrisburg, Pennsylvania